

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-6064

IN THE
UNITED STATES COURT OF APPEALS
For the Second Circuit

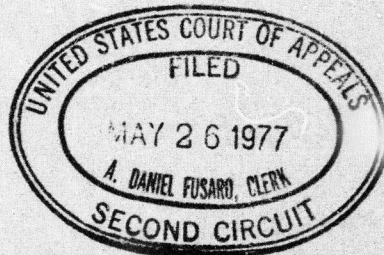
NO. 77- 6064

FRANK and ANNA SILVERMAN,
Petitioners-Appellants,

v.

COMMISSIONER OF INTERNAL REVNEU,
Respondent-Appellee.

PETITIONERS' RECORD
ON APPEAL



FRANK L. SILVERMAN, PRO SE
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ANNA SILVERMAN
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(212) 267-2760

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IN THE
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For the Second Circuit

NO. 77 - 6064

FRANK and ANNA SILVERMAN,
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v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent-Appellee.

PETITIONERS' RECORD
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207	77	0596	03	28	77	2	870	1	0720	AM, J.
PLTFFS									DEFENDANTS	

SILVERMAN, FRANK

IRS

FRANK and ANNA SILVERMAN

COMMISSIONER OF INTERNAL
REVENUE

CAUSE

42 USCA 407 ACTION TO VACATE LEVY ON PLTFF BANK ACCOUNTY

ATTORNEYS

FOR PLTFF:
Frank L. Silverman
258 Broadway
New York, N.Y. 10007
267-2760

☐ CHECK HERE IF CASE WAS FILED IN FORMA LAUPERIS	FILING FEES PAID			STATISTICAL CARDS	
	DATE	RECEIPT NUMBER	C.D. NUMBER	CARD	DATE MAILED
				JS 5	
				JS 6	

77C

596

SILVERMAN v. IRS

PROCEEDINGS

- 28-77 Petition filed. (See doc. #1.) ---
- 28-77 By PLATT, J.--Order to show cause ret. 4-1-77 for an order to vacate
levy on pltff accounts, etc filed with proof of service. (1)
- 28-77 Before PLATT, J.--Case called. Hearing on motion for an order to
show cause for an order to vacate levy, etc. set down for 4-1-77
at 9:30.
- 31/77 MEMORANDUM OF LAW IN opposition to petitioner's request to vacate
levy, filed by AUSA. *lg.* (2)
- 1-77 Before PLATT, J. - Case called. Petition for an order vacating levy
denied.
- 5-77 By PLATT, J. - Order of dismissal dtd 4-1-77 filed (p/c mailed
to pltff). (3)
- 5-77 Notice of entry of order of dismissal filed. (4)
- 7-77 Notice of appeal filed. (pltff) Copy to USA and C of A. (5)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x

FRANK and ANNA SILVERMAN,

Petitioners,

-against-

COMMISSIONER OF INTERNAL REVENUE,

77 C 596

Respondent.

- - - - - x

ORDER TO SHOW CAUSE

Upon the petition of Frank L. Silverman and the affidavit of Anna Silverman, in support thereof, all duly verified the 25th day of March, 1977, it is

ORDERED, that the Commissioner of Internal Revenue, show cause before Honorable Thomas C. Platt, a Judge of this Court, at a hearing to be held in Room 7, of the United States District Court, Eastern District of New York, at 225 Cadman Plaza, April 1, 1977, at 9:30 o'clock in the forenoon or as soon thereafter as counsel can be heard, why an order should not be entered vacating the levy on account No. 9-2263 account No. 9-17921 and account No. 060001388-3 in the Roosevelt Savings Bank, located at 254-09 Horace Harding Expressway, Queens, New York, and it is further

~~ORDERED that pending the determination of this motion the respondent be and he hereby is restrained from taking any action or obtaining payment on the said levy of the 16th day of March, 1977, against Frank and Anna Silverman, of the accounts No. 9-2263, 9-17921 and #060001038-3 with the Roosevelt Savings Bank and further cause appearing, it is further~~

/s/ TCP

ORDERED, that service of a copy of this Order, together with the papers upon which it was based and upon which it was issued be good and sufficient if made upon said Commissioner of Internal Revenue, at 136-59 37th Avenue, Flushing, N.Y. 11354, by Certified Mail delivery on or before the 28th day of March, be good and sufficient service.

Dated, New York, N.Y.
March 28, 1977.

/s/ Thomas C. Platt
United States Judge.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

- - - - - x

FRANK and ANNA SILVERMAN,

Petitioners,

-against-

P E T I T I O N

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

- - - - - x

To The United States District Court
Eastern District of New York:

The petition of Frank L. Silverman, respectfully
shows to this Court as follows:

1. That your petitioner is a duly licensed attorney at law in the State of New York.

2. That your petitioner was duly admitted to practice in this Court January 2, 1940.

3. That this petition is made in support of petitioners' application to vacate the levy made by the Commissioner on the savings accounts No. 9-2263 and 9-17921 and the checking account No. 060001038-3, in the name of Frank and Anna Silverman, with the Roosevelt Savings Bank, located at 254-09 Horace Harding Expressway, Queens, N.Y. Exhibit "A"

4. That the account No. 9-2263 contained the sum of \$25.78 account No. 9-17921 contained the sum of \$297.23 and the check account contained the sum of \$173.66, according the letter of the bank dated March 16, 1977, exhibit "A", attached hereto.

5. That the funds in all of the three accounts were the proceeds of deposits of social security benefit checks.

The deposit made by Anna Silverman, January 13, 1977, of \$92.10, a check received by her for her social security benefit payment.

The deposit made by her February 14, 1977, of \$92.10 a check received by her for February benefit payment. The check of \$100.00 came from the account of the same bank under number 9-2263, and those funds were moneys from prior social security deposits in the said account. (Exhibit "B" Deposit slips).

6. Between March 11, 1977 and March 18, 1977, the said Anna Silverman issued a total of \$131.83 in checks to the following:-

Dr. Gerald Mirrer,	\$50.60
Macy's	16.16
Lane Bryant	17.17
A.S.P.C.A.	8.50
Hadassah	5.00
Community Ambulance	5.00
and others totaling the sum of \$131.83	

7. That all of the aforesaid checks were issued by Anna Silverman, prior to the receipt of the notice of levy and those checks were for necessities.

8. After notification by the bank of the aforesaid levy, Anna Silverman, directed deponent to write to the Commissioner to advise him that the accounts that were attached by his office are funds or proceeds of the social security benefit checks.

9. March 18, 1977, deponent did write a letter to the said Commissioner, a copy of which is annexed hereto and same made a part hereof. (Exhibit "C")

10. Deponent further advised the Commissioner's office that a writ of certiorari was duly filed with the United States Supreme Court, March 10, 1977, and same is now pending in said Court.

11. March 23, 1977, a Mr. Fred Hecht of the Internal Revenue Service, called your deponent and advised that the levy will

not be vacated by his office, and stated that the writ of certiorari filed with the United States Supreme Court is not his concern.

12. It is specifically called the Court's attention to the fact that Section 407 of the Social Security prohibits levying or attaching social security benefit received by recipients.

See 42 U.S.C.A. Section 407:-

" The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or equity, and none of the moneys paid or payable or right existing under this subchapter shall be subject to execution, levy, attachment, or other legal process..."

13. The sentence reading "None of the moneys paid or payable or right existing under this subchapter shall be subject to execution or levy, attachment, garnishment or other legal process," should have been considered by the Commissioner when his attention was called to the fact that the accounts that were levied on were social security funds belonging to the said Anna Silverman, and not ordinary funds in a bank account.

14. That since the issuance of the levy on the aforesaid accounts in the Roosevelt Savings Bank, the petitioner Anna Silverman, was deprived of the use of the said funds and denied her the needs of every day living and caused her severe hardship under the circumstances.

15. That the said levy also caused her to be embarrassed and shamed because of the action of the internal revenue service in the making of the levy on her accounts.

16. It is respectfully that pending the determination of this motion, the respondent and/or his agents servants and/or employees be restrained in enforcing the levy

made by the Internal Revenue Service on the Roosevelt Savings bank on the accounts No.9-2263,9-17921 and #060001038-3 in the name of Frank and Anna Silverman.

WHEREFORE,petitioners respectfully request that the respondent's levy made on the Roosevelt Savings Bank,account No.9-2263,9-17921 and Account No.060001038-3 under the the name of Frank and Anna Silverman, be and the same be vacated and for such other,further and different relief as to this Court may seem just and proper in the premises for which no prior application has been made to this or any other Court for the relief demanded herein by petitioners.

Dated,New York,N.Y.
March 25,1977

/s/ FRANK L.SILVERMAN
FRANK L.SILVERMAN

STATE OF NEW YORK)
COUNTY OF QUEENS)SS.:

FRANK L.SILVERMAN, being duly sworn,deposes and says that he is the petitioner herein and that he has read the foregoing petition and knows the contents thereof; that the same is true to ddponent's knowledge, except as to those matters alleged on information and belief and as to those he believes it to be true.

Sworn to before me this
25th day of March,1977.

/s/ FRANK L.SILVERMAN

MORT M. HOROWITZ
Commissioner of Deeds, New York City
Qualified in N. Y. County No. 1-80
Term Expires October 14, 1977

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- x

FRANK and ANNA SILVERMAN,

Petitioners,

-against-

AFFIDAVIT

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

----- x

STATE OF NEW YORK)
COUNTY OF QUEENS)SS.:

ANNA SILVERMAN, being duly sworn, deposes and says:

That I am over the age of twenty-one years old and reside at 58-19 262nd Street, in the Borough of Queens, City and State of New York.

That I make this affidavit in support of an application to vacate a levy on my savings and checking accounts of the Roosevelt Savings Bank, at 254-09 Horace Harding Expressway, Queens, N.Y.

That I was born on the 8th day of October, 1908.

That I am a qualified recipient of social security benefits under the Social Security Law of the United States. That each and every month on the 3rd day of the said month I receive a check in the sum of \$92.10.

That upon the receipt of said check I deposit same in the Roosevelt Savings Bank, either in the savings accounts or in checking account.

That on January 13, 1977, I deposited the check that I received January 3, 1977, in the sum of \$92.10. I also deposited my February 3, 1977, check in the sum of \$92.10, in the said checking

account in said bank.

On March 15, 1977, I transferred from the savings account of said bank the sum of \$100.00, into the checking account to cover checks that I issued prior to the 15th day of March, 1977.

The funds from the savings account were also proceeds from the social security checks.

That after that I issued checks as follows:

Dr. Gerald Mirrer	\$50.60
A.S.P.C.A. license fee	8.50
Macy's	16.16
Lane Bryant	17.17 and

other checks for necessities were issued up to March 15, 1977.

That on March 18, 1977, the bank notified me by letter that the Internal Revenue Service filed a notice of levy on my accounts and any and all outstanding checks issued by me will not be paid by the bank.

I immediately communicated my husband what had taken place and of the levy with the bank.

I was advised that my husband by letter advised the Internal Revenue Service, Mr. Fred Hecht, that the funds that the service levied on were funds of checks of the social security benefits .

I was also advised that Mr. Fred Hecht, called my husband after the receipt of the said, letter of March 18, 1977, that he will not vacate the levy on those accounts.

That the said levy left me in a state of shock, and with outstanding unpaid bills for necessities.

That those funds in the bank, the savings and checking were all funds received for social security benefits under the social security law.

That under the circumstances, since the funds in the said accounts are proceeds of social security benefits, its use were to alleviate hardship and distress and anxiety, I am advised that such funds are not subject to levy, under the Social Security Law.

It is respectfully called the Court's attention to the fact that the checks issued by deponent were issued prior to 15th day of March, 1977, and were issued in payment of medical bills and other necessities and needs to maintain life and dignity.

For all of the aforesaid reasons, it is respectfully prayed that the Court issue an order vacating the levy on the aforesaid accounts with the Roosevelt Savings Bank, to wit; No. 9-2263, 9-17921 and the checking account in the said bank, in the name of Frank and Anna Silverman, and for such other, further and different relief as to this Court may seem just and proper in the premises, for which no prior application for the relief demanded herein has been made to this or any other Court.

Sworn to before me this
25th day of March, 1977.

MORI M. HOROWITZ
Commissioner of Deeds, New York Co.
Qualified in N. Y. County No. 1-80
Term Expires October 14, 1977

/s/ Anna Silverman
Anna Silverman

R-11

ROOSEVELT SAVINGS BANK ...to get you where you're going

254-09 HORACE HARDING EXPRESSWAY • QUEENS, N.Y. 11363 • 212/463-1000 423-6300



March 16, 1977

Mr. Frank and Mrs. Anna Silverman
58-19 262nd Street
Little Neck, New York 11362

Exhibit "A"

Dear Mr. & Mrs. Silverman:

We have this day received a Notice of Levy from the Department of Internal Revenue Service against your accounts #9-2263, 9-17921 and checking account #060001038-3. We are enclosing a copy of the Notice of Levy.

We have, therefore, been compelled to place a stop payment against your accounts.

You will find enclosed two drafts for the balance in each account. Please sign these and return them to us with your bankbooks.

The balance in your checking account is \$173.66. Please make check payable to the Internal Revenue Service for this amount. We will forward these amounts to the Director of Internal Revenue in payment of your levy.

Very truly yours,

Kathleen G. Smith
Administrative Assistant

KGS:la
Encs.

R-12

CHECKING ACCOUNT
DEPOSIT RECEIPTThis deposit will
be available for
your use in
☐ business
days.

Account No. ... 6 10383

DATE	DEPOSIT AMOUNT	
JAN 13	*****9210	

Exhibit "B"Please keep this receipt until transaction
is listed on your monthly statement.

**ROOSEVELT
SAVINGS BANK**

MEMBER FDIC

BF-107-7/76

TELLER'S STAMP

AUG 13 1977

CHECKING ACCOUNT
DEPOSIT RECEIPTThis deposit will
be available for
your use in
☐ business
days.

Account No. 06-10383

DATE	DEPOSIT AMOUNT	
FEB 14	*****9210	

Please keep this receipt until transaction
is listed on your monthly statement.

**ROOSEVELT
SAVINGS BANK**

MEMBER FDIC

BF-107-7/76

TELLER'S STAMP

FEB 14 1977

CHECKING ACCOUNT
DEPOSIT RECEIPTThis deposit will
be available for
your use in
☐ business
days.

Account No. 6-10383

DATE	DEPOSIT AMOUNT	
MAR 15	*****10000	

Please keep this receipt until transaction
is listed on your monthly statement.

**ROOSEVELT
SAVINGS BANK**

MEMBER FDIC

TELLER'S STAMP

MAR 15 1977

R-13

FRANK L. SILVERMAN

~~SILVERMAN AND SILVERMAN~~

ATTORNEYS AT LAW

258 BROADWAY

NEW YORK, N.Y. 10007

267-2760

March 18, 1977.

Internal Revenue Service
136-59 37th Avenue
Flushing, N.Y. 11354

Exhibit "C"

Re: Frank and Anna Silverman
58-19 262nd Street
Little Neck, N.Y.

Att. Mr. Fred Hecht:

Gentlemen:

My wife received a notice of levy that you made on the Roosevelt Savings Bank, on account Nos. 9-17921 and 9-2263 and also on her checking account in the same bank in the sum of of \$173.66.

The account No. 9-17921 the amount of said account the sum of \$297.23 and the account No. 9-2263, the sum of \$25.78.

Checks were issued on the checking account prior to your levy by my wife for necessities such as a check to Dr. Mirrer for the sum of \$50.60, a check to the A.S.P.C.A. \$8.50, R.H. May check for \$16.16, a check to Lane Bryant \$17.17 and other miscellaneous expenses in connection with life.

Further, the funds in the checking account and the savings accounts were all deposits from the social security funds received by us in prior months and the last check deposited in the checking account was my wife's social security check.

That on March 8, 1977, in our conversation we had on the phone I advised you that I am filing an application for a writ with the United States Supreme Court, requesting a review of the Court of Appeals decision of February 10, 1977.

That on March 10, 1977, I did file such application with the said Court received an index No. 76-1293 after the payment of the required fee therefor.

The funds upon which you levied pn are funds that came from social security payments are used for medical expenses, food and other necessities for life sustaining needs.

The funds that you tied up are funds that are used for emergencies as above indicated.

That in the interest of justive, and humanity, I am requesting that you immediately release these accounts and avoid undue hardship on old people and also avoid the deprivation of necessities that the said funds are in the foresaid bank.

I trust that you will comply and immediately vacate the levy on the accounts in the Roosevelt Savings Bank and avoid undue hardship and distress.

Yours Very Truly,

FRANK L. SILVERMAN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

FRANK and ANNA SILVERMAN,

Petitioners,

-against-

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

-----X

MEMORANDUM OF LAW OF PETITIONERS
IN SUPPORT OF MOTION

STATEMENT OF ISSUE PRESENTED

Did the Commissioner of Internal Revenue, have the right to make a levy on March 16, 1977, on the petitioners' savings and checking accounts No. 9-2263, 9-17921 and 060001038-3, the proceeds of social security benefit payments on deposit with the Roosevelt Savings Bank, under the above numbered accounts.

STATEMENT OF CASE

The Commissioner of Internal Revenue, levied on the petitioners' accounts though he knew that the funds of said accounts were social security benefit payments and that those payments are exempt from levy or attachment under the law.

That in addition thereto, the Commissioner also knew that petitioners have filed an application for a writ of certiorari in the United States Supreme Court, March 10, 1977, and same is now pending in said Court, to review the Court of Appeals decision of February 10, 1977.

P O I N T I

THE COMMISSIONER OF INTERNAL REVENUE
IMPROPERLY LEVIED ON THE FUNDS IN THE
ROOSEVELT SAVINGS BANK BOTH IN THE SAVINGS
ACCOUNTS AND THE CHECKING ACCOUNT
CONSISTING OF SOCIAL SECURITY BENEFIT
PAYMENTS OF THE PETITIONERS IN SAID ACCOUNTS.

The petitioners are both over the age of 65 years old to wit: Frank Silverman over 70 years and Anna Silverman, over 68 years, and both are receiving social security benefit payments under the Social Security Law. They receive every month on 3rd day of each and every month social security benefit checks and said checks are deposited in either the savings accounts or in the checking account of the Roosevelt Savings Bank. The deposit in the savings accounts earn interest on each deposit, and when the checking account fund becomes depleted a transfer of funds is made from the savings account into the checking account. That the checks of said account is used for payment of necessities, such as doctor's bills and other related items more specifically indicated in the affidavit of petitioner Anna Silverman of March 25, 1977.

The Commissioner's levy on the aforesaid accounts in the Roosevelt Savings Bank, not only embarrassed the petitioners but imposed great hardship and deprivation in that the said bank notified petitioners that all checks that were issued will not be paid and a charge of \$4.00 will be imposed on each of the returned checks. (See Exhibit "A").

The Commissioner was advised by letter dated March 18, 1977, that the funds upon which he levied on were social security benefit funds. (See Exhibit "C").

P_O_I_N_T_ II

Social Security benefits are exempt from levy, attachment, execution or garnis' under the following section:-

42 U.S.C.A. Section 407;-

" The right of any person to any payment under this subchapter shall not be transferable or assignable, at law or equity, and none of the moneys paid or payable or right existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process....."

In Brown v Brown, 266 N.E.2d.852, the Court said:

Intent behind exemption of this section is to protect benefits recipient receive and those depended on him from claims of creditors.

Essex County Welfare Board v Philpott, 1969, 249 A 2d.639;
104 N.J.Sup.280 Affd
In that case the County Welfare Board, 262 A.2d.227.

which advanced financial assistance for total disability under State Program total disability assistance which required the defendant to execute agreement to reimburse Board for all advances made, became a creditor of defendant to the extent of moneys advanced, and as such, was subject to limitations placed upon creditors by this section exempting money paid or payable as social security benefits from reach of creditors through legal process. (See also Dept of Public Welfare v Hedrick, 1964, 126 N W 2d.28; 22 Wis.2d.382) (See Century Indemnity v Meade, 1960, 159 A.325; 212 Vt 434) (See Gardner v Ewing, D.C.Ohio 1950, 88 F.Supp.315) Affd. 185 F.2d.781.

It is abundantly clear as above indicated that social security benefit payments paid to recipient or payments to be made to recipient are exempt from levy, attachment, execution or garnishment under the present law in cases of this type, and the levy made by the respondent should be vacated by this Court.

Philpott v Essex County Welfare Board, 409 U.S. 413-14
decided January 10, 1973, reiterated section 407 of the Social Security Law, as follows:-

"(N)one of the moneys paid or payable under this subchapter shall be subject to execution, levy, attachment, garnishment or other legal process...."

Therefore it follows, that social security benefit payments are exempt from execution, levy, attachment or garnishment or other legal process, and the petitioners come in under the provisions of said section in this case.

The Kane v Burlington Savings Bank, 320 F.2d. 545, is a case that involved unemployment disability payments, the Court in said case, stated as follows; on page 548-

" Section 407 makes no provision to exempt payments of unemployment compensation..."

Therefore the Kane case has no applicability to the case at at bar, since the payments received by the petitioners are social security benefit payments that were deposited in the Roosevelt Savings Bank accounts.

Section 6334(a)(c) of 26 U.S.C. did not abrogate 42 U.S.C.A. Section 407 of the Social Security Law, as can be seen from the decision of January 10, 1973, in the Philpott v Essex County Welfare Board, decision.

Accordingly. it appears clearly that the petitioners social security benefit funds are entitled to the protection of 42 U.S.C.A. Section 407 of the Social Security Law.

P O I N T I I I

Petitioners have shown to this Court that all of the deposits in the Roosevelt Savings Bank were the proceeds of social security benefit payments and those funds were used for maintenance and sustenance by an examination of the checks that were issued by the petitioners.

Counsel for the Commissioner on the oral argument for a stay in this matter, March 28, 1977, conceded that the funds in the Roosevelt Savings Bank were the proceeds of social security benefits received by the petitioners under the Social Security Law.

For all of the reasons above stated, it is respectfully prayed that the petitioners' motion should in all respects be granted by this Court, and for such other, further and different relief as to this Court may seem just and equitable in the premises.

Dated, New York, N.Y.
March 31, 1977.

Respectfully Submitted

FRANK L. SILVERMAN, PRO SE
Attorney for Anna Silverman
258 Broadway
New York, N.Y. 10006
267-2760

IS:RCF:gp
. 770488

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
FRANK and ANNA SILVERMAN,

Petitioners,

Civil Action
No. 77 C 596

-against-

COMMISSIONER OF INTERNAL REVENUE,

Respondents.
----- X

MEMORANDUM OF LAW IN
OPPOSITION TO PETITIONERS'
REQUEST TO VACATE LEVY

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Respondents
225 Cadman Plaza East
Brooklyn, New York 11201

RODGER C. FIELD
Assistant U.S. Attorney
(Of Counsel)

PRELIMINARY STATEMENT

This is an action by petitioners, Frank and Anna Silverman, for an order vacating a levy issued by the Internal Revenue Service ("IRS").

FACTS

The present petition is part of a long and litigious history between the IRS and the Silvermans, petitioners herein. Heretofore, the IRS had duly sent notices of tax deficiencies on account of substantial unreported income to the petitioners for the years 1960-1965. Petitioners exercised their right to appeal, and a lengthy and interrupted proceeding before the United States Tax Court was concluded by a decision on a stipulated settlement. Pursuant to this settlement, petitioners were assessed, between them, \$66,723.78 in tax deficiencies and \$33,361.90 in fraud penalties. */

*/ Based upon similar claims, Frank Silverman was convicted of attempted income tax evasion for the years 1961 - 1965. His conviction was upheld by the United States Court of Appeals for the Second Circuit. (U.S. v. Silverman, 449 F.2d 1341 (2d Cir. 1971) cert denied, 402 U.S. 953 (1972)).

Claiming duress, the petitioners appealed the stipulated settlement to the United States Court of Appeals for the Second Circuit which recently affirmed the decision below.

The taxpayers have not cooperated with the IRS in satisfying the outstanding assessments. Despite several requests, including a personal visit to Mr. Silverman's law offices, the taxpayers have refused to provide financial statements to the IRS. Investigation by the IRS uncovered the bank accounts which are the subject of this petition. Accordingly, on or about March 21, 1977 the IRS levied on the accounts in question.

Petitioners now move for an order vacating this levy on the grounds that the property in said accounts derived from social security benefits, which are said to be exempt from levy by the IRS. As will be more fully discussed below, this assertion is incorrect as a matter of law, and, moreover, petitioner has not even shown that the property in said accounts all derives from social security benefits.

ISSUE

Is the property described in the petition exempt from levy by the IRS?

ARGUMENTISOCIAL SECURITY BENEFITS ARE
NOT EXEMPT FROM IRS LEVY

Assuming for the moment that the property levied upon by the IRS can all be shown to be derived from social security benefits, petitioners rely upon 42 U.S.C. §407 for the proposition that such property is exempt from levy or execution. This provision is set forth in paragraph 12 of the Petition.

Notwithstanding 42 U.S.C. §407, petitioners overlook provisions of the Internal Revenue Code codified at 26 U.S.C. §6334 which enumerate property which is exempt from IRS levy. Section 6334(a) sets forth eight specific types of property which are exempt from levy, none of which exempt the property in question. Section 6334(c) goes on to provide:

"Notwithstanding any other law of the United States, no property or right to property shall be exempt from levy other than the property specifically made exempt by subsection (a)."

The clear import of the above provision is to override the exemption contained in 42 U.S.C. §407 with respect to an IRS levy. A brief examination of the legislative history behind these two provisions shows that Congress enacted Section 6334(c) in 1954, well after the enactment of 42 U.S.C. §407 on August 14, 1935 (C.531, Title II, §207, 49 Stat. 624) or the amendment thereto on August 10, 1939 (C.666, Title II, §201, 53 Stat. 1362). Moreover, Section 6334 was amended several times thereafter to provide for additional exemptions. Thus, despite ample opportunity to do so, Congress declined to specifically exempt social security benefits from levy.*

The history behind these provisions has been considered by the Court of Appeals for this circuit in Kane v. Burlington Savings Bank, 320 F.2d 545 (2nd Cir. 1963). In Kane, supra, the plaintiff was the recipient of disability insurance benefits under 42 U.S.C. §423, and the Court considered whether such benefits were exempt from levy. In

* Section 6334 was amended on August 28, 1958, Pub. L. 85-840, Title IV, §406, 72 Stat. 1047; June 21, 1965, Pub. L. 89-44, Title VIII, §812(a), 79 Stat. 170; Nov. 2, 1966, Pub. L. 89-719, Title I, §104(c), 80 Stat. 1137; Dec. 30, 1969, Pub. L. 91-172, Title IX, §945(a), 83 Stat. 729.

the course of its determination that such benefits did not fall under any specific exemption in Section 6334, the Court considered whether such benefits were exempt from levy pursuant to 42 U.S.C. §407. The Court stated:

"As an alternative ground of reversal, appellant urges that the monies received by him as disability insurance benefits ... were exempt from tax levy under 42 U.S.C. §407 which provides that 'none of the monies paid under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process.' It is clear, however, that 42 U.S.C. §423 [sic] has been superseded by 26 U.S.C. §6334(c), supra enacted in 1954. Contrary to appellant's suggestions, the fact that new substantive benefits, including certain disability insurance benefits of 42 U.S.C. §423, have been added since 1954 to the chapter covered by 42 U.S.C. §407 does not revive the operative force of the latter provision."

Accordingly, it appears clear from the plain terms of Section 6334(c) and the legislative history that the property levied upon by the IRS is not exempt from such levy.

II

PETITIONERS HAVE NOT SHOWN THAT THE
PROPERTY LEVIED UPON DERIVED FROM
SOCIAL SECURITY BENEFITS.

Petitioner has specifically alleged only that two social security checks were deposited in these accounts. This accounts for only \$184.20 of the total amount in the accounts of \$496.67. As to the difference between these amounts petitioner has not shown that such property is, in fact, derived from social security benefits.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition herein should be denied in all respects.

Dated: Brooklyn, New York
March 30, 1977

Respectfully submitted,

DAVID G. TRAGER
United States Attorney
Eastern District of New York

RODGER C. FIELD
Assistant U.S. Attorney
(Of Counsel)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Frank and Anna Silverman

v.

Commissioner of Internal Revenue

No. 77 C 596

ORDER OF DISMISSAL

This case was brought on by Order to Show Cause returnable April 1st, 1977. As the sole relief sought in that Order was denied at that time, this case is ordered closed.

SO ORDERED

Thomas C. Cio
U. S. D. J.

Brooklyn, New York
April 1, 1977

BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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FRANK and ANNA SILVERMAN,

Petitioners,

-against-

COMMISSIONER OF INTERNAL REVENUE,

77 C 596

Respondent.

----- x

NOTICE OF APPEAL

Notice is hereby given that petitioners FRANK and ANNA SILVERMAN, individually and collectively hereby appeal to the UNITED STATES COURT OF APPEALS, FOR THE SECOND CIRCUIT, located at Foley Square, New York, N.Y., from each and every part of the order of this Court as well as from the whole thereof entered in the above captioned proceeding under docket number 77 C 596 and entered in this Court on April 5, 1977, as well as from the denial of the stay made by petitioners orally by petitioners in this Court March 28, 1977, as well as from the whole thereof.

Dated, New York, N.Y., April 7, 1977.

Respectfully Submitted

FRANK L. SILVERMAN, PRO SE and
Attorney for Anna Silverman
258 Broadway, New York, N.Y. 10007
267-2760

TO: United States Attorney
225 Cadman Plaza
Brooklyn, N.Y.

Commissioner of Internal Revenue
136-59 37th Avenue
Flushing, N.Y. 11354

RELIANCE
U.S. ATTORNEY

APR 25 12 54 PM '77

EAST. DIST. N.Y.

James Bracco